BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Complying with Rule 27 of this Court, the Subject Index of this Brief is found commencing on page i. The decision of the Circuit Court of Appeals is found at R. 1161. It is reported at 59 USPQ 416, 138 F. 2d 875. The decision of the trial court is found at R. 984 and is reported in 56 USPQ 361. A statement of jurisdiction is found on page 21, *supra,* in the Petition for Certiorari. A statement of the case is found in the Petition, pages 1-21. The specification of errors is found in the questions and reasons set forth *supra* on pages 22-30.

Reason 1 (*Re*: *Question 1*):

> In sanctioning the granting of the Motion for Summary Judgment without giving leave to amend, the Circuit of Appeals has decided an important Federal question in a way probably in conflict with applicable decisions of this court and in conflict with Rules of Civil Procedure 56(c) and 8(a).

One of the two causes of action set forth in Count V, namely that in paragraph 17, 19 and 20 (R. 225, 226, 956 and 957), charges that the respondent Sharon Steel has created a monopoly in the United States tie iron business by using its large steel tonnage as a means of making tie iron sales and has damaged petitioner by taking away petitioner's customers. The Findings of Fact are silent upon the following points. In July, 1935, Sharon Steel entered the tie iron field by taking the New York Central tie iron business away from its debtor the Sharon Railway Supply Company (Ex. 13, R. 587). Jones, manager of the Supply Company, stated that "the real reason" why the respondent Sharon Steel got the account "was because

the Sharon Steel Corporation was in shape to get the tonnage. Mr. Beegle knows that" (R. 122). Eighteen months later the respondent Sharon Steel had all of the Supply Company business.

In 1938, Sharon Steel asked for a license under the petitioner's patent or for petitioner to purchase from the respondent Sharon Steel his strip steel for making his tie irons (R. 320, 399). After refusal, the respondent Sharon Steel got all of the Pennsylvania Railroad business (R. 246).

Paragraph 20 of the Complaint (R. 957) charges that respondent Sharon Steel used its tonnage over railroads having headquarters in Chicago to get tie iron business and that respondent Sharon Steel had sixty-five to seventy per cent of the United States tie iron business by 1940.

The price quoted by the Sharon Railway Supply Company for the tie irons charged to infringe in 1935 was $4.80 a thousand (Ex. 28, R. 635). Respondent Sharon Steel's price for the accused devices to the Pennsylvania Railroad in 1938 was $6.25 to $7.75 a thousand (Ex. 30, R. 639), although the accused devices have less steel in them than equal sized "S" or "C" irons (R. 393).

The question here presented is an important one. The use of tonnage in a systematic way to monopolize an item purchased by railroads will concentrate the railroad supply business in the hands of large shippers. If a large shipper is permitted to engage in the practice of exerting pressure upon railroads in a pleasant but effective manner so as to eliminate from competition those not having such tonnage, a precedent will be set which will quickly eliminate all small railroad suppliers who are not operating under valid patent protection.

In the only case involving tonnage that has come to the writer's attention the Federal Trade Commission enjoined the Waugh Equipment Company of Chicago, Illi-

nois, from using tonnage as a means of getting railroad supply business, *Federal Trade Commission* v. *Waugh Equipment,* 15 Fed. Trade Com. Decisions 232, 245. Moreover, the Federal Trade Commission found that Waugh was using tonnage as the means of getting business, despite the denials of Waugh's officers and employees, by inference from the percentage of the total business which Waugh got and from the close relationship of Waugh's officers to the large railroad shipper, Armour & Company. Drawing such an inference from the existence of a better than 50 per cent monopoly when there exists illegal conduct explanatory of the monopolist's success seems justified by the decision of this court in *Fashion Guild* v. *F. T. C.,* 312 U. S. 457 (1940).

The trial court granted the Motion for Summary Judgment on the ground "that the plaintiff has no possibility of establishing the case he pleads." Petitioner submits that this ground is contrary to the express language of Rule of Civil Procedure 56(c), which only permits the granting of a motion for summary judgment when "there is no genuine issue as to a material fact." A trial judge is not entitled to decide whether or not a party can introduce evidence sufficient to support his pleadings. *Whitaker* v. *Coleman,* 115 F. 2d 305 at 306, C. C. A. 5th (1940); *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. 2d 1016 at 1018, C. C. A. 3rd (1942).

The decision of the Circuit Court of Appeals is not clear. Apparently the Circuit Court of Appeals did not note that Count V contains two causes of action: Firstly, in paragraphs 17 and 18, the respondent Sharon Steel is charged with acquiring all of the stock of the Supply Company so as to substantially reduce competition and damage the petitioner by vitiating the Settlement Agreement; and secondly, in paragraphs 17, 19 and 20, the respondent Sharon Steel is charged with using tonnage to obtain a

monopoly and deprive petitioner of his customers. The Circuit Court of Appeals mentioned this second cause of action as if it were an adjunct of the first and then disposed of the first cause of action on two grounds: Firstly, that the trial judge had found that the respondent Sharon Steel had no knowledge of the Settlement Agreement and hence could not have damaged petitioner willfully; and secondly, that the charging paragraphs of the Complaint contained no "allegations of the specific injury suffered by the plaintiff" and that the "manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business must be pleaded."

Only the second cause of action, namely that found in paragraph 17, 19 and 20, is brought here for review. The only defect found in these paragraphs by the Circuit Court of Appeals is that they are not sufficiently definite. Petitioner submits that the Circuit Court of Appeals' position is incorrect for two reasons: firstly, the allegations are sufficiently definite to comply with the requirements of the law existing prior to the adoption of Rule of Civil Procedure 8(a); and secondly, Rule of Civil Procedure 8(a) sets up a new standard for definiteness of complaints.

While the decisions relied on by the Circuit Court of Appeals at R. 1169 do not seem to stand for the proposition asserted by that court,[1] the true rule is well stated in

[1] In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, a trust complaint for damages was dismissed because it alleged that the wrongful acts occurred in Costa Rica. In *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156, aff'g. 271 Fed. 445 C. C. A. 7th, the court held that a complaint charging that defendant had combined with others and charged plaintiff excess rates was bad in law only because these very rates had been approved by the Interstate Commerce Commission. In *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. 2d 747, C. C. A. 8th (1939), cert. denied 314 U. S. 644, the

Glen Coal Co. v. *Dickinson Fuel*, 72 F. 2d 885, 887, C. C. A. 4th:

> "To recover the plaintiff must establish two things: (1) A violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act."

As applied to the present case, the question is: do paragraphs 17, 19 and 20 of the Complaint sufficiently allege the specific damage done to the petitioner?

These paragraphs are not to be considered alone, however, for they form part of a single complaint wherein paragraph 16 of Count IV states that the respondent Sharon Steel has taken away the Pennsylvania Railroad tie iron account. Paragraph 20 states that the respondent Sharon Steel is using tonnage to get the tie iron business of certain railroads in Chicago. Moreover, the damage suffered is clear,—namely the loss of orders for tie irons from the Pennsylvania Railroad and railroads having headquarters in Chicago.

It should be noted that after the Bill of Particulars was filed (R. 956-957), *the respondent Sharon Steel made*

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court held that a trust complaint by a jobber of gasoline that alleged damage due to raised prices by a combination of wholesalers was defective where it did not allege that the retail price did not rise proportionately so that it appeared that plaintiff's profit was about the same regardless of the alleged wrongful act. In *Locker* v. *American Tobacco*, 218 Fed. 447, the court held that defendant's sales contract with price was legal and plaintiff's damages could not therefore be considered. This situation was reversed by the Clayton Act. In *American* v. *O'Halloran*, 229 Fed. 77, C. C. A. 2nd (1915), the complaint was held sufficient and trial was had, but certain of the damages were held conjectural. In *Leonard* v. *Socony Vacuum*, 42 F. Sup. 369, the facts and decision are identical to those in *Twin Ports Oil* v. *Pure*, *supra*. In *Louisiana* v. *Great A & P Tea*, 40 F. Sup. 897, the court held that fruit growers whose income is derived from a wholesale price can show no damages resulting from the use of a "price leader" by a defending retailer. This case, the only case in point, was reversed by the Circuit Court of Appeals for the 8th Circuit, which gave leave to amend, 6 Fed. Rules Serv. 58.

no further objection as to definiteness, but denied the allegations (R. 957-961) *of Paragraphs 19 and 20 of Count V.*

The petitioner submits that the Circuit Court of Appeals erred, secondly, by applying decisions relating to definiteness of a complaint which are no longer in force. Rule of Civil Procedure 8(a) requires a plaintiff to set forth his cause of action without pleading specific, evidentiary matter. This rule is applicable to complaints based upon 15 U. S. C. Section 15. *Securities & Exchange Com.* v. *Time Trust, Inc.*, 1 Fed. Rules Ser. 83, D. C. Cal., *United States* v. *Johns-Manville Corp.*, 4 Fed. Rules Ser. 73 D. C. Ill. Holly (1941), *Lousiana Farmers* v. *A & P*, 5 Fed. Rules Service 55 D. C. D. C. Ark. reversed in 6 Fed. Rules Service 58 C. C. A. 8th, *McJunkin* v. *Richfield*, 3 Fed. Rules Ser. 63, D. C. Cal. (1940), *Emich Motors* v. *General Motors*, 7 Fed. Rules Serv. Case 2 8a 464, *Dean Rubber* v. *Julius Schind*, 7 Fed. Rules Serv. 8a 464 Case 1. It was drafted for the purpose of avoiding controversies over the definiteness of pleadings. In drawing paragraph 7 of Count V, petitioner charged "that the cause of action arises from a violation of the Federal Anti-Trust Laws to wit: * * * Section 2, Chapter 647 of the Law of July 2, 1890, 26 Statutes, 209, Title 15 U. S. C., Section 2." By this manner of pleading, petitioner is entitled to rely upon the language used in the statute, just as if copied into the complaint, and 15 U. S. C. Section 15 reads: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws. * * *" See *Securities & Exchange Commission* v. *Time Trust, Inc.*, 1 Fed. Rules Service 83, D. C. Cal.

The petitioner, therefore, submits that the second cause of action of Count V, (paragraph 17, 19 and 20 of the Complaint) is definite and trial thereon should be granted.

But even if these paragraphs are indefinite, leave to

amend should be granted. *International Ladies Garment Workers Union* v. *Donelly Garment Co.*, 121 F. 2d. 561, C. C. A. 8th, and *Louisiana Farmers* v. *A. & P.*, 6 Fed. Rules Service 58, C. C. A. 8th.

Reason 2 (Re: Questions 2 and 3):

> In declining to determine the applicability of Title 5, Pennsylvania Laws, Section 3852-907 (1933 Corporation Act), of *Commonwealth* v. *Merchants National Bank*, 323 Pa. 124, and of *Nolan* v. *Doyle*, 338 Pa. 389 to the transfer of the Sharon Railway Supply Company assets to the respondent Sharon Steel, the Circuit Court of Appeals for the Seventh Circuit has ignored the rule of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, that local law governs the legal effect of the transactions in question.

A study of Exhibits B (R. 757), 3a (R. 565), 5 (R. 573), 7 (R. 579), 8 (R. 579), 9 (R. 580), 10 (R. 581), 11 (R. 582), 12 (R. 617), 13 (R. 587), 14 (R. 617), 15 (R. 617), 17 (R. 617), 6 (R. 769), H (R. 772), and H-1 to H-10 (R. 788), establishes that the entire transfer of the Sharon Railway Supply Company assets to the respondent Sharon Steel took place in Pennsylvania. Under *Erie* v. *Tompkins*, 304 U. S. 64, Pennsylvania law controls the effects of the transfer.

It is therefore necessary to determine whether the respondent Sharon Steel's lack of knowledge of the Settlement Agreement when it took the assets of the Sharon Railway Supply Company as a going concern relieves Sharon Steel of liability under the Settlement Agreement under Pennsylvania law.

Reason 3 (Re: Question 2):

> In deciding that the respondent Sharon Steel is not bound by the Settlement Agreement, Ex. 1, as the surviving corporation of a *de facto* merger under Title 5, Pennsylvania Laws, Section 3852-907 (1933 Corporation Act), the Circuit Court of Appeals has

decided an important question of Pennsylvania law in a way probably in conflict with this applicable Pennsylvania decision,—*Commonwealth* v. *Merchants National Bank of Allentown*, 323 Pa. 124, 185 Atl. 823 (1936), and with this decision of this court,—*Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522, aff'g. 98 F. 2d 807, C. C. A. 3rd.

This is an important question. Its answer determines whether or not a state of the United States can by statute prevent corporations from evading their liabilities by the simple expedient of transferring all of their assets, employees, and good will under the guise of a bill of sale to another who carries on the business. The Commonwealth of Pennsylvania has long recognized that the sanctity of contracts and the ultimate soundness of corporate relationships is dependent upon a careful supervision of the dissolution of a corporation. This state has recognized that a going business is difficult to create and that acquisition of such a business by a stranger can only be fair if the stranger takes the bad with the good. In 1871 Pennsylvania adopted a short form merger act and in 1909 a long form merger act. Both of these acts were replaced by the merger provisions of the Act of 1933 relating to corporations. This 1933 act is more stringent than any of the earlier acts and is designed to make certain that a going business cannot be transferred to a stranger free of the various liabilities that the going business acquired in the course of its existence. This is the pertinent statute:

Pennsylvania Statute 2852-907 of Title 15

"2852-907. Effect of merger or consolidation. * * * The surviving or new corporation shall thenceforth be responsible for all the liabilities and obligations of each of the corporations so merged or consolidated * * * and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted by judgment as if such merger or consolidation had not taken place, or

the surviving or new corporation may be proceeded against or substituted in its place. * * *" Pennsylvania Statutes, 1936.

Supplementing this statute, is Section 2852-1105 of Title 15, Pennsylvania Statutes, which requires the officers of any dissolving corporation to sign a statement containing the following sentence:

"All debts, obligations and liabilities of the corporation have been paid and discharged, or adequate provision has been made therefor."

In these two laws the Commonwealth of Pennsylvania has concentrated its efforts to prevent frauds on innocent third parties due to the dissolution of a corporation while the business is nevertheless carried on by another entity.

Petitioner has lost the value of the covenant not to infringe by the Sharon Railway Supply Company, although the very machines and the very men who made the 1935 infringing devices are now making the presently accused devices. The justification for this loss to the petitioner resides according to the respondent Sharon Steel in the fact that the respondent did not know of the obligation at the time it acquired the Sharon Railway Supply Company assets. Petitioner submits that the law of Pennsylvania does not permit such evasion of corporate executory contracts.

We do not raise a question of fact here. The findings and the record are indisputable that respondent Sharon Steel got all the assets, all of the employees, all of the accounts receivable and all of the good will of the Sharon Railway Supply Company (see the first and second paragraphs on pages 9 and 10 *supra*). There is a Finding of Fact that at the time of this acquisition by the respondent, the respondent did not know of the Settlement Agreement (Finding of Fact 12, R. 990).

This court might well first decide whether the 1936 trans-

fer of assets was in fact a merger or sale, for under Pennsylvania law, evidence showing the true nature of the transaction will be admitted despite a self-serving bill of sale. *Commonwealth* v. *Merchants National Bank of Allentown,* 32 Pa. 124, 185 At. 823 (193y) which relied heavily upon the Illinois Supreme Court case of *Chicago, Santa Fe and California Railway* v. *Mary Ashling,* 160 Ill. 379 (1896) says:

> "Why was this not a consolidation of the St. Louis company with the Santa Fe company? There is no magic in words. Merely calling the transaction a purchase and sale would not prevent it from being a consolidation."

The elements of a merger in Pennsylvania are set up by the Third Circuit Court of Appeals in *Metropolitan Edison* v. *Helvering,* 98 Fed. 2nd 807 (1938):

> "The analysis of this transaction shows: (1) That the Power Company transferred all of its assets to the petitioner; (2) that the petitioner was an existing corporation and continued to exist; (3) that the Power Company, though it did not automatically cease to exist upon the completion of the transaction, did discontinue all operations and was left without stockholders or property of any sort; and (4) that the petitioner, both by contract and operation of the law, became liable for the debts of the Power Company. 14 C. J. 970; 15 Fletcher Cyclopedia Corporation, section 7127; *In re Harr, supra; In re Buist's Estate, supra; Commonwealth* v. *Merchants Nat. Bank of Allentown, supra.*"

These elements are present in the case at bar as follows: (1) the respondent Sharon Steel got all of the Sharon Railway Supply Company assets; (2) the respondent Sharon Steel was existing before the transfer and has continued to exist; (3) the Sharon Railway Supply Company ceased to exist; (4) the respondent Sharon Steel and Sharon Railway Supply Company entered into some sort of an agreement to transfer all the assets to the respondent Sharon

Steel on the understanding that Jones and Shaughnessy each got $1,000 (R. 153). The respondent Sharon Steel assumed all *known* liabilities,—see Mrs. Shaughnessy's testimony, R. 50, lines 19 and 20, and Mrs. Shaughnessy and Mr. Jones signed the statement to the Commonwealth of Pennsylvania that provision had been made for all Sharon Railway Supply Company obligations, on the instructions of the respondent Sharon Steel's attorneys (R. 129). Finally, the laws of Pennsylvania provide for merger and for the obligations imposed on the surviving corporation to a merger.

The question, therefore, is: can a surviving corporation of a *de facto* merger in Pennsylvania escape liability on a contract of the merged corporation of which contract it had no knowledge at the time of the merger. The answer is, petitioner submits, "No."

In the first place, the obligations imposed by Pennsylvania law upon the surviving corporation of a *de facto* merger are no less than those imposed on the surviving corporation of a *de jure* merger. This court in *Helvering v. Metropolitan Edison*, 306 U. S. 522 (1938), affirming the Third Circuit Court of Appeals said:

> "The court below has held, and we concur that, under the laws of Pennsylvania, the transfer in question constituted a *de facto* merger, even though the transfer did not comply with all the provisions of the Act of 1874, and that, as matter of law, the tax payer would be liable for the debts of the transferor."

And the Supreme Court of the Commonwealth of Pennsylvania in *Commonwealth v. Merchants National Bank of Allentown*, 323 Pa. 124, 185 Atlantic 823 (1936) said:

> "We cannot adopt a rule that would permit the repudiation of lawful obligations by the failure of two corporations to observe required procedural steps in uniting their property under one charter. It is sufficient to say that the declared policy of this commonwealth governing consolidation *de jure* requires similar assumption of liability by consolidations in fact."

The ultimate question then is: what is the effect on the respondent Sharon Steel's liability under this Settlement Agreement of respondent's not knowing of it when it took the Sharon Railway Supply Company assets? The Supreme Court of Pennsylvania has squarely held that the obligation of the surviving corporation of a *de facto* merger is not avoided by the fact that the surviving corporation did not know of the existence of the obligation of the merged corporation at the time that the *de facto* merger was effected, *Commonwealth* v. *Merchants National Bank of Allentown*, 323 Pa. 124. In this case a Trust Company organized under Pennsylvania laws lawfully became surety on a guardian's bond. Thereafter, in 1929, the Trust Company and a National Bank contracted to consolidate and all of the Trust Company assets were conveyed to the National Bank. The consolidation steps did not comply with the law and at best constituted a *de facto* consolidation. The guardian defaulted and the minor sued the bank on the bond. The bank denied knowledge of the bond at the time of consolidation and stated that had the bond been disclosed, there would have been no consolidation. The Pennsylvania Supreme Court accepted these contentions as true, and then held the bank liable on the ground that a surviving corporation of a *de facto* merger is liable for the absorbed corporation's liabilities whether it knew of them or not.

This question, this argument, and these authorities were all submitted to the Circuit Court of Appeals for the Seventh Circuit, as well as to the trial court. Neither court mentioned either the question or the authorities. We submit that the question here presented is an important question and has been decided probably contrary to decisions of this court and of the Supreme Court of the Commonwealth of Pennsylvania.

Reason 4 (Re: Question 3):

> In deciding that the respondent Sharon Steel is not bound by the Settlement Agreement, Ex. 1, as the silent joint adventurer with and financier of the Sharon Railway Supply Company, in getting the order for and profiting by the sale of the tie irons which became the subject of that agreement, the Circuit Court of Appeals has decided an important question of Pennsylvania law in a way probably in conflict with this applicable Pennsylvania decision,—*Nolan* v. *Doyle*, 338 Pa. 398, 13 Atl. 2d 59 (1940).

This is an important question. Its answer determines whether or not a responsible party may damage a third party in the course of a venture for profit with an irresponsible party and avoid liability because its relationship to the transaction was not publicly known.

The question here presented is solely a question of law. The facts disclose four acts of the respondent Sharon Steel extending throughout 1935 wherein the respondent joined with the Supply Company in attempting to get the Pennsylvania Railroad tie iron account. (1) The respondent Sharon Steel obtained for the Sharon Railway Supply Company the very order for tie irons from the Pennsylvania Railroad that resulted in the Settlement Agreement (Finding of Fact 13a) (R. 990). (2) After the petitioner orally charged the Sharon Railway Supply Company with infringement in an interview at Sharon, Pennsylvania, on April 21 or 22, 1935 (R. 324, lines 2 and 3 on), and commencing on April 26, 1935 (Ex. M, R. 813), and continuing through November 18, 1935 (Exs. N, O and P, R. 813, 814), the respondent Sharon Steel joined with the Sharon Railway Supply Company in endeavoring to sell the Pennsylvania Railroad a crinkled "C" iron. The respondent crinkled the steel for these experimental irons, (Stipulation, R. 152). (3) The respondent throughout 1935

financed the insolvent Sharon Railway Supply Company (R. 620, lines 4 to 6). (4) The Sharon Railway Supply Company supplied the respondent Sharon Steel with tonnage lists so that respondent Sharon Steel's salesmen could get tie iron business for the Sharon Railway Supply Company (R. 150). The trial court's Findings of Fact made no mention of these facts. Additionally, both companies profited by the sale of these 1935 accused irons: Sharon Railway Supply Company got the profit on the fabrication of the tie irons and the respondent Sharon Steel got the profit on the steel used in the tie irons (R. 123-124). The respondent's participation in getting the order was not publicly known (R. 323) and the respondent denied participation therein in the present suit until it was proven at the Philadelphit deposition (see Exs. 27-1, 27-2 and 28, R. 631 to 635 and Finding of Fact 13a, R. 990).

Petitioner charged only the Supply Company with infringement (R. 323 and R. 609) and the Supply Company alone executed the Settlement Agreement, Ex. 1 (R. 560). The respondent did not then participate in the Settlement Agreement or know of its execution, according to Findings of Fact 13 and 13a.

Upon these facts, the Supreme Court of Pennsylvania would probably find the defendant a joint adventurer. That court in *Nolan* v. *Doyle*, 338 Pa. 398, 13 At. 2d 59 (1940) at 62 said that corporations could enter into joint adventures and found that a single dredging operation by two corporations for mutual profit was sufficient to establish a joint adventure and justify protection of a damaged third party against either joint adventurer. In 33 C. J. 841, there is the following definition:

> "A joint adventure has been aptly defined as a special combination of two or more persons, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation."

So far as is known, this court has never passed on the common law doctrine of joint adventurers. In the recent case of *Fleischer* v. *U. S.*, 311 U. S. 15 (1940) the Circuit Court of Appeals for the Second Circuit had held that notice to one joint adventurer was good as against another joint adventurer (107 Fed. 2d 925 C. C. A. 2d (1939)). The question was not submitted to this court for consideration, this court saying:

> "* * * at this bar, the actual receipt of the notice and the sufficiency of its statements have not been challenged."

The facts in the case at bar establish a much stronger case for finding a joint adventurership than to the facts in *Nolan* v. *Doyle*, 338 Pa. 398.

As for the effect of establishing a joint adventureship here, 33 C. J. 871, Sec. 99, clearly states the obligations of joint adventurers to third parties:

> "As to third persons who deal with a joint adventurer in good faith and without knowledge of any limitations in his authority, the law presumes him to have been given power to bind his associates by such contracts as are necessary to carry on the business in which the joint adventurers are engaged, and they become liable on such contracts, notwithstanding they may have expressly agreed amongst themselves that they should not be liable."

And in the case of *Anderson* v. *Weber and Rabsilber*, 162 App. Div. N. Y. 725 (1914), Appeal Dismissed, 220 N. Y. 763, 116 N. E. 1033, the court held that a first adventurer was bound to pay for merchandise delivered late under a contract where a second joint adventurer had waived the contract's time requirement without the knowledge of the first joint adventurer.

Similarly, in the case at bar, one joint adventurer, the Sharon Railway Supply Company, was notified of infringement in 1935, and settled the charge. The Settlement should be equally binding upon the respondent, Sharon Steel.

Reason 5 (Re: Questions 4 and 5):

> In deciding that patent claims may be narrowed despite an acknowledgment of validity of the claims, the Circuit Court of Appeals for the Seventh Circuit has rendered a decision in conflict with this decision of another Circuit Court of Appeals on the same matter, *Nachman Spring Filled Corp.* v. *Kay Mfg. Co.*, 139 F. 2d 781, 59 U. S. P. Q. 349, at 355, C. C. A. 2d (1943).

This is an important question. Its answer determines whether or not lawyers can settle a patent infringement charge or must litigate the charge. Thus, in the present case, the petitioner charged infringement in 1935 and the respondent's joint adventurer, the Sharon Railway Supply Company, did not think that petitioner's devices were of sufficient importance to justify litigation (R. 591, fourth from last line, to R. 592, line 4) and the patent attorney for the Sharon Railway Supply Company advised the latter that the 1935 accused devices infringed the petitioner's patent (R. 611, 612). In 1935, the petitioner could have done one of two things: (a) he could sue or (b) he could settle. (a) If he sued, and the Sharon Railway Supply Company did not defend, the court would have entered a decree finding the patent valid and the claims infringed. Thereafter, when the respondent brought out the presently accused devices, the petitioner would have instituted contempt proceedings to determine if the accused devices were merely a "colorable" departure from the 1935 accused devices. By contempt proceedings, petitioner's chances of prevailing against the presently accused devices would have been very good. (b) If petitioner settled by accepting an acknowledgment of validity and a promise not to infringe again, there being no price fixing clauses as were involved in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 55 U. S. P. Q. 379, or any other clause in violation of the federal anti-trust laws, presumably the

petitioner would have a legal right approximately as good as if he had ignored the Sharon Railway Supply Company's desire to settle.

It is submitted that authority is not necessary to substantiate this statement: the policy of the law is to encourage the settlement by parties of legal controversies where the settlement has not illegal ulterior objects or does not result in frustrating the laws. In the present case, the Settlement Agreement, Ex. 1 (R. 560), is a simple document. It contains no price fixing agreements or any clauses intended to give the petitioner a monopoly on anything but the legally granted patent monopoly.

The Circuit Court of Appeals has not enforced the acknowledgment of validity clause in deciding Count I. Presumably the reason is that the Circuit Court of Appeals did not think that this respondent was bound by the Settlement Agreement. The Circuit Court of Appeals did not say so, however, in discussing Count I. The Circuit Court of Appeals' handling of Count I indicated that it felt free to narrow the claims so as to emasculate them of all value while nevertheless holding the patent valid. Neither the trial court nor the Circuit Court of Appeals invalidated a single claim.

The petitioner submits that the present decision is in conflict with the recent decision of the Second Circuit Court of Appeals in *Nachman Spring-Filled Corp.* v. *Kay Mfg. Co.,* 139 F. 2d 781, 59 U. S. P. Q. 349. In the *Nachman* case, the plaintiff sued the defendant on patents 1,352,157 and 1,411,227 and got judgment. While the suit was in progress, the defendant brought out a device that infringed plaintiff's patent 1,793,724, not involved in the suit. The parties settled all controversies by an agreement which acknowledged the validity of all these patents and which contained a promise not to infringe again. As to patent

1,793,724, the facts in the *Nachman* case are identical with those of the case at bar. The defendant in the *Nachman* case then brought out a device that the plaintiff in a suit charged was an infringement of patent 1,793,724, which patent had not been litigated. The Second Circuit Court of Appeals squarely held that *the validity of the patent could not be attacked* if the agreement was not in violation of the federal anti-trust laws or some state law *and declined to narrow the plain meaning of the words of the claims so as to avoid infringement.* (The court remanded the case to take evidence as to whether the agreement was in violation of federal or state laws.)

In the case at bar, claim 3, for example, calls for an open polygon type iron having a body portion and diverging arms with an "angulate member" at the end of each arm. The word "angulate" means "having angles", *Webster's New International Dictionary*, Merriam, Second Edition, Unabridged, page 104. The claim specifies no degree of angularity. In applying the claim to the accused devices, the Circuit Court of Appeals declined to treat each end crinkle as an angulate member and said that the accused devices lack "L-hook terminals". Thus, in substance, the court held that the words "L-hooked terminals" must be read into the words "angulate member". All one need do to avoid petitioner's patent is to use a 110° angle instead of a 90° angle.

Is such narrowing of the claims permissible when the parties have acknowledged the validity of the claims in the form appearing in the patent? The Patent Office did not think that claims 1, 2, 3 and 4 included the limitation "L-hooked terminal" because claims 5 and 6, not here charged to be infringed, contain substantially the same limitation —"L-shaped terminals". Claim 5 differs from claim 3

only in that claim 5 calls for the "angulate member" terminal. There is no justification for two claims if they both mean the same thing.

Moreover, the parties to the Settlement Agreement did not think that claims 1, 2, 3 and 4, could only be infringed by a device having an "L-hooked terminal" because the parties agreed that the 1935 devices were infringements and each end lug on these devices is not an "L-hooked terminal" but a straight lug at an angle of about 135° to the arms. *Indeed, the parties thought that the gist of petitioner's invention resided in the three sided open-polygon shape. Sharon Railway Supply Company's lawyer in telling Sharon Railway Supply Company how to avoid the petitioner's patent suggested that the shape be changed* (*R. 611*). He said, "If this iron were bent in a different manner—say thus (illustration) it would not infringe the claims of this Beegle patent for these claims require the body or center portion of the body to be straight." And the attorney's illustration shows single end lugs which are not at right angles to the diverging arms.

The Circuit Court of Appeals ignored the intention of the parties and the effect of the acknowledgment of validity, and narrowed the claims in view of prior art not considered by the Patent Office.

Plaintiff submits that if the defendant is bound by the Settlement Agreement, the words of the claims are to be given their ordinary meaning. This is the holding of *Nachman Spring-Filled Corp.* v. *Kay Mfg. Co.*, 59 U. S. P. Q. 348 at 354, C. C. A. 2d. If given their ordinary meaning, the claims in suit are infringed in terms. As for the crinkles in the body portion and arms of the accused devices, this is nothing but adding something to a patented structure and does not avoid infringement. See *Sanitary*

Refrigerator v. *Winters and Crampton*, 280 U. S. 30, 3 U. S. P. Q. 40 at 44; *Madden* v. *Appleton*, 115 F. 2d 589, 47 U. S. P. Q. 293 C. C. A. 7th (1940).

Reason 6 (*Re: Question 7—Count II*):

> In ruling that the criterion for retermining the infringement of the patent under Count I is the correct criterion in determining what constitutes a breach of the Settlement Agreement under Count II, the Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable local decisions.

The Circuit Court of Appeals disposed of Count II by assuming that the respondent, Sharon Steel, was bound by the Settlement Agreement and then said, R. 1165:

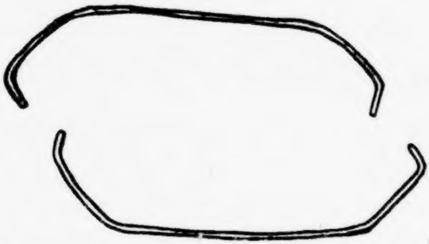
> "Inasmuch as defendant's device did not infringe, there is no breach of contract. Defendant never agreed to refrain from manufacturing non-infringing devices."

The petitioner submits that this is incorrect. The parties agreed that the Sharon Railway Supply Company (respondent) was not to make a tie iron which constituted what the parties thought at the time of making the agreement to be an infringement,—not what a judge at some future date might decide was an infringement.

The Settlement Agreement indicates what the parties deemed to be an infringement. For in that agreement, R. 560, there appears:

> "Whereas the company (Sharon Railway Supply Company) sold and delivered to the Pennsylvania Railroad Company, a certain order of five hundred thousand (500,000) anti-splitting devices for cross ties, *which devices, it is mutually agreed, were infringements of said letters patent;*"

These are the devices, Ex. 3, R. 563:



The degree of angularity between the end lugs and the arms of these devices varies from 110° and 140°. None of the angles are right angles and none of the straight end lugs are "L-hooked terminals". In signing the Settlement Agreement, therefore, the parties agreed that a device could not escape infringement of the claims of the patent in suit because the angle of the end holding lug was not a 90° angle with the arm.

Petitioner submits that the parties to the Settlement Agreement agreed that petitioner's patent covered the open polygon shape of the tie iron,—not the end terminals. More-over, what the parties thought the petitioner's patent covered may be inferred from what the trade thought the patent covered, and the A. R. E. A. when adopting the petitioner's "Saf-Tie" iron relied on *shape*, not terminal holding members. The A. R. E. A. report at R. 727 says:

> "The result of this test indicates that all these *shapes* of irons, viz., the 'C', 'S' and 'Saf-Tie', when properly applied will meet the requirements."

Sharon Railway Supply Company entered into the Settlement Agreement after its attorney advised that the important element of Beegle's claims to avoid *was the open polygon Shape*, see R. 611 where the word "bent" is used.

The Circuit Court of Appeals has ignored this under-

standing of the parties to the Settlement Agreement, for in deciding that there was no infringement under Count 1, the court said that the accused devices "lack the L-hook terminals", completely ignoring the identical shape of the irons. By this the court decided that the *scope of the claims was so narrow that they were not infringed by the devices accused in 1935.*

It may be that the Circuit Court of Appeals is right in concluding that, as a technical patent question, an L-hook terminal must be read into every one of the petitioner's claims and that consequently the petitioner's claims do not even read on the accused devices of 1935. But the parties expressly contracted to the contrary in 1935 and it is submitted that a contract must have sanctity and must be enforced.

In determining the meaning of the words "to cease from and refrain from further infringement thereof." found in the Settlement Agreement, the Circuit Court of Appeals has decided that the respondent only promised not to again infringe the patent. What constitutes infringement of a patent will vary with the judge who decides that question. *While a court may decide what constitutes non-infringement in the absence of an expressed intention by the parties, it is submitted the court may not rely on factors which the parties have agreed do not affect the question of infringement.* This is exactly what the Circuit Court of Appeals has done in making the question of infringement turn on the configuration of the end terminals. In Williston on Contracts, Revised Edition, Volume 3, Section 607, there appears the following statement under "Standard of interpretation where a writing has been adopted,"

> "According to the weight of authority and on principle, where the parties have assented to a writing as an expression of their agreement, or where a writing

> is required by law, the standard of interpretation is the standard of limited usage, that is, the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with such circumstances as surrounded its making."

And the Restatement of the Law on Contracts, Vol. 1, Sec. 230 which uses the word, "integration" as the equivalent of "writing" says:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definitive meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

In the case of *Wooster* v. *Trowbridge*, 120 Fed. 667 C. C. A., 2nd (1903), there was a controversy as to whether the words, "damages for infringement" included "profits for infringement." In deciding that the latter term was included in the former, the court said on 668:

> "In order to interpret the agreements properly it is necessary that they should be considered only in the light of the facts existing at their inception."

On page 670 the court said:

> "We are convinced that the parties never had in contemplation an agreement which permitted Kursheedt to recover one-quarter of a judgment entered 20 years after the date of the agreement in a suit which he did not institute or promote."

The law seems clear that we should look to the parties who signed the Settlement Agreement, their statements and the statements of their lawyers to find out whether or not the agreement is avoided by the simple expedient of crinkling the steel in the iron.

When, therefore, the Sharon Railway Supply Company (Respondent) agreed that it would not again infringe, it meant that it would not again make an iron of open polygon shape.

Petitioner submits that this is the law. It is the exact converse of the rule applied by the Circuit Court of Appeals.

Petitioner submits that this is an important question. The vast majority of controversies over patents are settled without resort to the courts. When such settlements are made, the parties of necessity have to agree as to what constitutes an infringement. It is not the intention of the patentee when such agreements are signed that the agreement shall be invalidated ten years later because of a change in judicial attitude as to the scope of claims.

What has happened in the instant case illustrates the evils that follow from failure to enforce a contract. Petitioner's invention was considered of little value in 1935 when the Settlement Agreement was signed (Jones letter, top of R. 592). By strenuous work during the years 1935, 1936 and 1937, petitioner pushed his invention to an important position. A financially responsible party then saw that the Settlement Agreement was disadvantageous and devised the accused devices to circumvent the Agreement. Its right so to do should not depend upon 1943 concepts of infringement, but upon the criterion of infringement laid down by the parties to the Settlement Agreement.

Reason 7 (Re: Question 6):

> By substituting its judgment as to the validity of a patent for the judgment of the Patent Office, the judgment of the only official non-partisan group of experts in the field, the judgment of a substantial portion of the purchasing public, and the judgment of competitors, and in ignoring the fact that respondent sold the accused devices by urging the very advantages ad-

vanced by the patentee to the Patent Office as the means of being granted a patent, the Circuit Court of Appeals has decided a federal question relating to the presumption of validity that attaches to a United States patent in a way probably in conflict with applicable decisions of this court.

At the present time, this court is on record to the effect that a patent granted by the United States Patent Office carries a presumption of validity.

In *Radio Corp.* v. *Radio Engineering*, 293 U. S. 522, 21 U. S. P. Q. 355 (1934) this court said at ....:

"A patent regularly issued, and even more obviously a patent issued after a hearing of all the rival claimants, is presumed to be valid until the presumption has been overcome by convincing evidence of error."

In order to give effect to this presumption, a trial judge should not invalidate a patent unless there is a clear showing that the Patent Office was wrong in granting the patent. This presumption has long attached to patents and while not statutory, it is based on the thought that specially trained men in the Patent Office are better qualified to determine invention than the average lay judge.

Today, the courts do not seem to give more than lip service to this presumption. Trial judges freely consider the effect of the prior art relied upon by the defendant even though that prior art is the same or no better than the prior art considered by the Patent Office. Petitioner's counsel believes that this tendency to ignore the presumption of validity attaching to a patent is a judicial extension of this court's attitude toward patentees who misuse their patents, as exemplified in the line of decisions terminating recently in the *Mid-Continent* v. *Mercoid* case, 60 U. S. P. Q. 21, 320 U. S. .... (1944). This court's determination to curb such practices, however, does not mean

that this court has repudiated its position that a patent has a presumption of validity.

Upon the presumption of validity rests the entire patent structure of this country. Without this presumption, there is no reason for having a large United States Patent Office. Without the presumption an inventor should, like a writer or composer, simply file a claim of invention and obtain a certificate. In the event of infringement, the patentee would have to establish his patent in the courts,—as does a copyright proprietor.

It is submitted that such procedure as to patents is exactly what Congress wished to avoid. The number of different arts in the world is almost myriad and the ability of any one man to determine an advance in any given art is small. The theory of requiring the Patent Office to search the prior art by a competent man in the given art before a patent is granted is justifiable only if the examination and opinion of an expert are deemed worthwhile. The plain inference from Sec. 482 of the Revised Statutes, 15 U. S. C. Sec. 7, is that patents shall be freely granted, and that where refused, such refusal must be approved by examiners in chief who "shall be persons of competent legal knowledge, and scientific ability."

When, therefore, the United States Patent Office has decided that there has been a patentable advance in the art, it should be set aside only when there is a clean cut showing that the Patent Office has overlooked something and that the thing overlooked is substantially better prior art than the matter considered by the Patent Office.

The importance of deciding whether or not there is a presumption attaching to a patent is in no small part dependent upon the importance of the patent system to our economic life. The petitioner submits that, next to hard work, the patent and copyright systems are the greatest

equalizers of wealth that exist in the country today. Fortunes in this country have been accumulated largely as a result of speculations in real estate, speculations in industry, profits derived from inventions and copyrighted material, and from the attrition quality of capital. It is everywhere evident that the first two of these factors are declining in importance. The stabilization of population has limited speculative enterprises in real estate and industry with the result that the man who has capital, which for the most part is now inherited, has a tremendous advantage over *novi homini.* So long, however, as this nation rigorously and liberally enforces the patent and copyright laws, men without means who, however, create things, can by virtue of the monopoly given them and by public use, obtain for themselves that necessary additional profit which gives them a foothold in the competitive world. The writer believes that copyrights and patents stand on the same foundation and that only when these two branches of the law are rigorously enforced, at least in favor of individuals, can our society avoid that resulting rigid stratification of property between those who have by inheritance and those who have not,—also by inheritance. An established business which has distributors and dealers throughout the country, has an overwhelming advantage in keeping the individual small enterpriser from breaking into the competitive field.

As for how the foregoing applies to the case at bar, Beegle was a day laborer in the tie yards of the Moss Tie Company of East St. Louis, Illinois, commencing about 1922. He had spent a substantial portion of his life as a lumberjack in the Pacific Northwest where he acquired an excellent knowledge of woods. In 1923 he was driving "S" and "C" irons in the ends of ties which had just been stacked for the purpose of seasoning them for six months

or a year prior to placing them in track. He decided that "S" and "C" irons were so shaped that they could not fully attain their objectives, and he got into the habit in his spare time of straightening out "S" and "C" irons and reshaping them to various configurations so as to anticipate certain kinds of splitting. By 1926 he had perfected a "Z" iron for single ironing the end of a tie and the present invention for double ironing the end of a tie. In 1926 or 1927 he submitted these irons to the Tie Committee of the American Railway Engineering Association, which committee is composed of those men employed by the various railroads of the country best qualified to judge the merits of such a device. After extensive experiments conducted in 1927 to 1930, this committee in 1930 adopted the petitioner's iron as a third standard iron along with the "S" and "C" irons. This committee's opinion is nonpartisan and should carry great weight.

The petitioner built his own machines to make his iron and has never tried to make either "S" or "C" irons. By 1935 he had reached a place where he was doing between five and ten per cent of the entire tie iron business of the United States. Highland Steel of Terre Haute, Indiana, National Forge of Louisville, Kentucky, Laclede Steel and Western Wire Products Company of St. Louis, Missouri, all asked for licenses and these were declined. The respondent's predecessor, Sharon Railway Supply Company, infringed and signed the Settlement Agreement. The respondent itself in 1938 asked for a license. Up until the infringement started in 1938, the patent in suit had been recognized as valid by every manufacturer in the field.

The respondent has described the accused devices to the trade as possessing the very advantages which Beegle claimed for his iron in his patent and which he claimed for his iron in his advertising. Consider this chart.

The patent in suit describes the patented iron as follows:	Sharon Steel describes the "structure, design, operation and principle" of the accused iron in its advertisement, Ex. 96, R. 749, as follows:	Beegle has described his commercial iron in his advertisement, Ex. C, R. 763, as follows:
1. "The length of the body portion a of my improved iron has been determined with reference to these usual lines of 'spike split.'	1. "In addition to these two designs the Sharon 'special' iron is especially adaptable for marginal reinforcement.	1. "The main body portion is naturally adapted for horizontal alignment with the stresses that operate across the top and the bottom of the tie.
2. "The angular faces and terminal members of my device serve effectively to prevent yielding or slippage along this line * * * R. 1050, ll. 53-56	2. "Its angular shape and open side provide reinforcement for all vertical and diagonal radial lines	2. "The obtusely angled arms cross the diagonal radials without recrossing these natural lines of split * * *
3. "A further object is the provision of an anchor having a maximum range of adaptability for meeting the demands of * * * wind shakes, spike split, season checking and other irregularities * * * R. 1049, ll. 21-28	3. "and it can be reshaped to fit any form of checking.	3. "When unusual situations make advisable the reshaping of an anti-splitting device by a driver, the Saf-Tie iron is readily bent to the desired form * * *
4. "One of the objects of this invention is to provide a double purpose reinforcing iron, which iron is equally adaptable for use as a single iron, or which can be used to advantage where two or more irons are employed for reinforcing the end sections of a railway tie." R. 1049, ll. 10-16.	4. "The 'Special' design is particularly suited for double ironing, a practice which is increasing in popularity on many road."	4. "Properly placed in pairs with the open side toward the pith of the tie and so placed before destructive action has started, Saf-tie iron can reasonably be expected to reduce to a practical minimum losses through cross-tie splitting."

Finally, the petitioner's patented iron has met with substantial commercial success. The tie irons are purchased only by railroads using hardwood ties and these railroads for the most part are in the New England, North Middle Atlantic and Eastern Central states. Petitioner's tie iron has been adopted by the Pennsylvania Railroad, the Burlington Railroad, the North Western Railroad and the Wabash. Some irons have been sold to the New Haven. At the time when this infringement started, approximately one-third of all tie irons sold in the United States were sold by the petitioner. At the present time, if the accused device is considered to be the petitioner's type of iron, approximately one-third of all the tie irons sold in the United States are petitioner's type.

In filling the Pennsylvania Railroad orders for tie irons, the respondent has filled them with accused devices even though these orders called for petitioner's "Saf-Tie" irons. When the respondent got the approval of the Pennsylvania Railroad to purchase these irons, they were represented by the respondent to meet the A. R. E. A. specifications which call for a "Saf-Tie" iron.

In the face of these facts, the Circuit Court of Appeals has narrowed the petitioner's claims to a point where they have no value. In substance, the Circuit Court of Appeals invalidated the claims. The claims in suit, 1, 2, 3 and 4, differ from claims 5 and 6 in that they do not state that the terminal holding members have to be "L"-shaped. Yet the Circuit Court of Appeals read the word "L-shaped" or "ninety-degree angle" or "L-hooked" terminal into the first four claims. This was done on the same prior art considered by the Patent Office or upon prior art that was no better than that considered by the Patent Office (excepting dowels). The two best references relied upon by the Circuit Court of Appeals were Williams 1,201,008 and 1,208,255, both showing tie irons. Williams was brought

from California to the trial and testified that he was primarily interested in making the steel strip for tie irons and that the steel strip which he designed was found by him upon experiment to be valueless (R. 547). Thereupon, he abandoned his tie irons and gave nothing of any value to the nation. One of these patents was not cited by the Patent Office but the patents lie in the same box one on top of the other in the Patent Office files (Ex. WW, R. 942), and in citing references, an Examiner acts under an order of the Commissioner of Patents requiring him to cite only the best art and not to repeat himself by citing equivalent art.

The Circuit Court of Appeals also relied on the small nails of Walker, 300,536, Starr 547,093 and Rasner, 515,168. These small nails are known to everyone as devices for clamping together two edges of seasoned wood such as the mitered edges of a window screen. The Patent Office considered devices like this and it did not consider that such art was anticipatory of a tie iron (Ex. AA-1, R. 933).

Finally, the Circuit Court of Appeals relied upon two dowels, Fiebig, 436,584 and Sayre, 180,070. A dowel is not a drive device. A dowel is a device that is placed in a prepared hole and is intended to function for its structural strength as well as its tensile strength. The result is that a dowel must be made of heavy metal and consequently cannot be driven into wood because to drive would be to split the wood, thereby defeating the entire purpose of a tie iron. *The Patent Office did not consider dowels as anticipatory and does not classify dowels with drive devices* (Ex. WW, R. 941-942).

Petitioner submits that such invalidation does not show that the Patent Office was clearly wrong in granting the patent and for all substantial purposes negatives any presumption of validity attaching to the patent. A decision which relies for its validity upon the use by an inventor of

the words "timber anchor" in place of "tie iron" in his claims when the inventor prosecuted his patent application himself, is based on a ground which ignores the intent and purposes of the patent law.

An examination of the accused devices and the patented device shows that they differ in just one respect, namely, that the accused device is crinkled throughout its length. The accused device does have angulate terminals, it does have a main body portion and it does have two diverging arms at each end thereof. To invalidate a patent either directly or by narrowing the claims on the basis of such art which was expressly brought to the attention of the Patent Office is to substitute the judgment of the courts for the judgment of the Patent Office and it is submitted that such is not the intention of Congress.

Re: Questions 8 through 11:

If the court grants certiorari, the petitioner would like to argue questions 8 through 11.

Respectfully submitted,

....

MAX W. ZABEL,

WILFRED S. STONE,
Of Counsel.

Received five copies of the foregoing Petition for Certiorari and Supporting Brief this .... day of March, 1944.

....

HARRY W. LINDSEY, JR.,
On behalf of all attorneys for all defendants.